FOR ARGUMENT

In The

Supreme Court of the United States

October Term, 1979

NO. 78-1595

GEORGE CALVIN LEWIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petitioner, George Calvin Lewis, Jr. respectfully submits this brief in reply to the brief filed on behalf of the United States.

ARGUMENT

At the outset, we would respectfully submit that the government has not correctly phrased the question presented. In its brief, the United States submits, on page 2, that the question is "Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior

conviction as a defense to a prosecution for unlawfully possessing a firearm." We believe that the question is narrower. The underlying conviction in this case was obtained in violation of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). In his dissenting opinion in the Court of Appeals, Judge Winter based his conclusions on the fact that the defect alleged was the denial of Lewis' Sixth Amendment right to counsel. (App. 27). Similarly, in a Comment on the *Lewis* case in the Summer 1979 issue of *The Harvard Law Review,* the writer correctly seems to suggest that the real issue involves the *Gideon* violation, and not every alleged constitutional infirmity might be set up as a defense. *The Use of Prior Uncounseled Convictions In Federal Gun Control Prosecutions: United States* v. *Lewis,* 92 *Harv. L. Rev.* 1790, 1798 (June, 1979).

The United States suggests on page 17 that the omission from the federal gun laws of provisions permitting the accused to challenge the constitutionality of the predicate felony suggests that Congress intended no such defense to be available. However, we submit that the two statutes mentioned, 21 U.S.C. § 851 (c) (2) and 18 U.S.C. § 3575 (e), reflect a general congressional awareness that such defenses are proper defenses.

The government, on page 32 of its brief, states that the burden was on Lewis to establish his right to possess a firearm by previously challenging his prior conviction before he was arrested on the firearms charge. We believe, however, that any interpretation which places on Lewis the duty of expunging a patently void conviction is unreasonable and at odds with this Court's decision in *Gideon, supra, Burgett* v. *Texas,* 389 U.S. 109 (1967), *Loper* v. *Beto,* 405 U.S. 473 (1972), and *United States* v. *Tucker,* 404 U.S. 443 (1972).

Further, the statutes involved can be interpreted in such

a fashion as to avoid reaching the constitutional question. There is, in our view, necessarily an ambiguity in the word "felon" or "felony" when used to describe the status of one convicted in violation of *Gideon* v. *Wainwright, supra.* "Though Lewis' constitutional objections may not be unequivocally established in Supreme Court precedent, they do raise questions serious enough to merit a narrower construction of the statute." *The Use of Prior Uncounseled Convictions in Federal Gun Control Prosecutions: United States* v. *Lewis, supra* at 1795. We can perceive no reason to attribute to Congress the intention to include persons whose convictions are absolutely void.

The government suggests, beginning on page 39 of its brief, that equal protection concepts do not preclude a conviction in this case. While it is true that the petitioner did not raise equal protection or due process points in his main brief, that is not to say that these concepts do not apply. See Footnote 52, *The Use of Prior Uncounseled Convictions In Federal Gun Control Prosecutions: United States* v. *Lewis, supra* at 1797.

Finally, the United States, on page 48 of its brief, appears to argue that the real penalty imposed on Lewis was a civil firearms disability. Obviously, that is not the case. While a civil liability did attach in the view of the Court of Appeals, the real penalty was imprisonment for eighteen months. The government also suggests, on page 49 of its brief, that "it could not seriously be contended that the Sixth Amendment would afford a defense to an escape charge if the prisoner's outstanding conviction were invalid under *Gideon.*" We believe that this statement is inaccurate. The crime of escape, we submit, presumes valid custody. See generally 30A *C.J.S., Escape,* Section 2, page 876. Also, in *McDorman* v. *Smyth,* 188 Va. 474 (1948), the Supreme Court

of Virginia suggested that if the accused had escaped from custody pursuant to a conviction void from want of counsel, then his escape would not have been punishable.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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CERTIFICATE

I certify that three copies of this Brief were mailed first class, postage prepaid, to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

ANDREW W. WOOD